

U.S. Department of Labor

Office of Administrative Law Judges  
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Issue Date: 29 August 2003

Case No. 2003-STA-6

MARK E. HOWICK,  
Complainant,

v.

CAMPBELL-EWALD COMPANY,  
Respondent.

**ORDER DENYING COMPLAINANT'S MOTION FOR PARTIAL SUMMARY  
JUDGMENT; ORDER DENYING COMPLAINANT'S MOTION FOR LEAVE TO FILE  
FURTHER EXHIBITS/ARGUMENT; ORDER DENYING COMPLAINANT'S MOTION  
TO VACATE THE ORDER DATED AUGUST 7, 2003; ORDER DENYING  
COMPLAINANT'S MOTION TO ALTER DEADLINES; ORDER RESERVING  
JUDGMENT ON COMPLAINANT'S MOTION FOR A PROTECTIVE ORDER;  
ORDER RESERVING RULING ON EMPLOYER'S MOTION TO DISMISS; PRE-  
TRIAL ORDER; THIRD AMENDED SCHEDULING ORDER**

This matter arises under the Surface Transportation Assistance Act of 1982 ("the Act" or "STAA"), 49 U.S.C. §§ 2305, and the regulations promulgated thereunder at 29C.F.R. Part 1978. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules.

Upon assignment of this matter, the undersigned issued a pre-hearing order on November 18, 2002. Following a telephone conference on December 23, 2002, an order and memorandum of telephone conference was issued setting the deadlines for completion of discovery matters and scheduling the hearing for April 29 through May 2, 2003 in Dayton, Ohio. The parties requested a settlement judge on December 23, 2002, which was granted by the undersigned on January 6, 2003. Administrative Law Judge Daniel J. Roketenetz was appointed as the settlement judge on January 17, 2003. Following a conference call on January 24, 2003, an order was issued granting an extension of discovery deadlines and re-scheduling the hearing for June 10 through June 13, 2003. Additionally, the parties agreed that Complainant would answer Employer's interrogatories and requests for production of documents by February 24, 2003. Complainant and Respondent also agreed to reschedule the deposition of Complainant from January 29, 2003 in Dayton, Ohio to March 1, 2003 in Dayton, Ohio.

Edward Slavin, Esq. entered a notice of appearance on behalf of Complainant on January 29, 2003. Pursuant to a motion filed by Complainant on February 10, 2003, the undersigned granted Complainant an extension to complete Employer's interrogatories and request for production of documents until February 26, 2003 due to an illness in Complainant's family. Employer was directed to respond to Complainant's interrogatories and request for production of documents by February 28, 2003. On February 14, 2003, Respondent served an amended notice of deposition on Complainant, scheduling Complainant's deposition for March 1, 2003. That same day, Complainant moved to correct the record, to quash the notice of deposition, as for a "default judgment, adverse inferences and preclusions orders based on Respondent's failure to timely answer the Court's Prehearing Order." The undersigned then issued an amended order and order on February 21, 2003, pursuant to requests submitted in correspondence to the undersigned by counsel of Complainant. The amended order vacated the undersigned's order dated February 14, 2003, and denied the requests made by Complainant. Additionally, the undersigned apprized the parties that he expects "that official and personal considerations such as the initial appearance of counsel, family illnesses and planned vacations or trips will be considered, just as I would do, as long as such considerations are not abused." The parties were also admonished to resolve the outstanding discovery issues between them, including due dates for complete answers to interrogatories and the dates of depositions. On February 25, 2003, settlement proceedings were extended for sixty days. However, Administrative Law Judge Roketenetz issued an order on February 28, 2003 terminating settlement proceedings.

Complainant requested an extension of the hearing date on April 14, 2003. On April 22, 2003, based on Complainant's representation that he need an extension of time to prepare for his upcoming hearing due to his recent return to work after caring for his ailing parents for three months, Complainant's additional representation that Respondent did not object to a continuance of the hearing provided that the parties exchange certain discovery documents, the parties were granted a ninety-day extension on all deadlines. The hearing was re-scheduled for September 9 through September 13, 2003 in Dayton, Ohio.

On July 9, 2003, Complainant filed a motion to join Jack Maxwell as an individual respondent and to add the Toxic Substances Control Act as an additional statutory basis for relief. Following another telephone conference between the parties, the scheduling order was again amended through an order issued on July 25, 2003. Additionally, the July 25, 2003 order granted Complainant's request to conduct individual interviews of non-management employees of Respondent, provided that Complainant provide counsel for Respondent with a list of the individuals to be interviewed by August 11, 2003. Respondent was granted an extension of time to file a response to Complainant's motion to amend the complaint to join Jack Maxwell as an individual respondent and to add the Toxic Substances Control Act as an additional statutory basis for relief. Additionally, Complainant requested an order granting *ex parte* interviews of Respondent's employees. Upon request by the undersigned to Complainant to forward a copy of his complaint, Complainant submitted a document entitled "Complainant's First Written Statement" signed by Complainant on July 17, 2002. Complainant then submitted a document entitled "Complainant's Motions *In Limine* 1-10" on July 28, 2003. Respondent submitted a response to Complainant's motion to amend complaint on July 31, 2003. The undersigned denied Complainant's motion to amend complaint on August 7, 2003. Also on August 7, 2003, Respondent submitted a brief in opposition to Complainant's motion *in limine*. The undersigned

re-issued a notice of hearing on August 13, 2003, re-affirming that a formal hearing was scheduled on September 9 through September 13, 2003 in Dayton, Ohio.

On August 12, 2003, Complainant filed a motion for “partial summary judgment on the issues of res judicata and collateral estoppel on the lack of ‘just cause’ for the firing and the lack of any ‘insubordination,’ as found by the State of Ohio, and on liability for firing and blacklisting, subject matter jurisdiction, timeliness, temporal nexus, employer-employee, notice and knowledge of protected activity, and creation of a hostile working environment.” Counsel for Complainant also requested leave to file further exhibits due to the need to review Respondent’s discovery responses and due to the death of counsel’s father. Additionally, upon leave to make further filings, Complainant requested that the undersigned vacate the August 7, 2003 decision and order “on Mr. Maxwell and TSCA.” Also filed with Complainant’s motion for partial summary judgment were motions from Complainant for a protective order regarding his personal and financial information, as well as a motion to alter deadlines for discovery and discovery motions due to the death of counsel’s father. On August 20, 2003, the undersigned issued an order denying Complainant’s motion *in limine*, wherein counsel for Complainant was cautioned against filing frivolous pleadings, motions, or other papers for an improper purpose or without evidentiary support for factual contentions.

The undersigned received exhibits from Complainant in support of his motion for partial summary judgment on August 22, 2003, and again the following day. Also on August 22, 2003, Respondent filed a brief in opposition to the motions filed by Complainant on August 12, 2003. Respondent filed a motion to dismiss on August 27, 2003, to which Complainant filed a response on August 28, 2003. Complainant filed a response to Respondent’s response to Complainant’s motion for partial summary judgment on August 25, 2003.

The undersigned conducted a conference call with the parties on August 28, 2003, wherein the undersigned advised the parties of his rulings on all motions presently pending. This order shall serve to set forth the undersigned’s orders and directives as set forth during the August 28, 2003 conference call.

1. Complainant’s Motion for Partial Summary Judgment

Pursuant to a motion filed under 29 C.F.R. § 18.40(d), an administrative law judge may grant summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. Moreover, the administrative law judge may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion. 29 C.F.R. § 18.40(d). The requirements for an administrative law judge to issue a summary decision are found at 29 C.F.R. § 18.41.

Complainant’s motion for “partial summary judgment on the issues of res judicata and collateral estoppel on the lack of ‘just cause’ for the firing and the lack of any ‘insubordination,’ as found by the State of Ohio, and on liability for firing and blacklisting, subject matter

jurisdiction, timeliness, temporal nexus, employer-employee, notice and knowledge of protected activity, and creation of a hostile working environment” is denied. Complainant has prevented Respondent from taking his deposition; he has denied Respondent access to discovery.

Through a proper notice of deposition dated January 6, 2003, Respondent scheduled the deposition of Complainant for January 29, 2003 in Dayton, Ohio. Complainant objected to the “unilateral” scheduling of the deposition. On February 14, 2003, Respondent served Complainant with an amended notice of taking deposition, which scheduled Complainant’s deposition for March 1, 2003 in Dayton, Ohio. That same day, on February 14, 2003, Complainant filed a letter with the undersigned requesting that the undersigned quash the Respondent’s notice of deposition because the date was both “inconvenient and unavailable” for Complainant’s counsel. On August 7, 2003, Respondent served Complainant with a third notice of taking deposition, scheduling Complainant’s deposition for August 19, 2003 in Michigan. Complainant did not attend the August 19, 2003 deposition.

The undersigned cautioned the parties about the misuse of personal reasons as justification for not meeting deadlines. The undersigned does not dispute the veracity of Complainant’s and counsel’s accounts of personal tragedy, which sadly include family illnesses and death, broken water-heaters, and medical procedures. Indeed, I express my deepest sympathy. That being said, personal tragedies do not justify a lack of professionalism. After learning that his father had died on August 10, 2003, counsel for Complainant was able to draft and submit a twenty-five page motion for partial summary judgment, but he was unable to timely notify Respondent that he and Complainant would not attend the depositions and interviews scheduled for August 19, 2003. Instead of notifying the Respondent personally, counsel for Complainant engaged Complainant to participate in *ex parte* communications with Respondent to provide notice. Since January of 2003, Complainant has frustrated Respondent’s attempts to take his deposition based on the personal reasons of his own and of his counsel. Complainant has clearly denied access to information to Respondent, who opposes his motion for partial summary judgment. Allowing Complainant to prevail on a motion for partial summary judgment, when Complainant has denied Respondent the ability to mount a meaningful defense to such a motion, would violate Respondent’s procedural due process rights and offends traditional notions of fair play and substantial justice. Therefore, Complainant’s motion for partial summary judgment is denied. Moreover, upon reviewing the statements, affidavits, documents, and the videotape submitted by Complainant in support of his motion for summary judgment, the undersigned finds that the record is replete with genuine issues of material fact.

Even though Complainant’s motion for partial summary judgment is denied, the undersigned finds that Respondent has not contested the issues of whether Complainant timely filed his complaint, whether Complainant has established subject matter jurisdiction under the STAA, and whether the parties were engaged in an employer-employee relationship. Additionally, Complainant presented substantial evidence that he engaged in protected activity while he was employed by Respondent. Therefore, as discussed in the conference call, Complainant is to present a list of specific instances of the protected activity he purports to have engaged in to Respondent, who in turn is expected to state whether or not it admits or contests each specific instance. The parties are directed to jointly submit, by September 5, 2003, the list of specific instances of alleged protected activity along with Respondent’s reply to each instance.

2. Complainant's Motion for a Protective Order

An administrative law judge is authorized to issue such protective orders that may be consistent with protecting privileged communications or sensitive or classified material. 29 C.F.R. §§ 18.46(a), (b). Complainant may submit a proposed agreement for the protection of sensitive material that identifies with specificity the information that will be the subject of a protective order. Therefore, the undersigned reserves ruling on Complainant's motion for a protective order.

3. Complainant's Motion for Leave to File Further Exhibits/Argument

As I have denied Complainant's motion for partial summary judgment, this motion is rendered moot. Therefore, Complainant's motion for leave to file further exhibits/argument is denied.

4. Complainant's Motion to Vacate the August 7, 2003 Order

Upon reviewing the order issued on August 7, 2003 denying Complainant's motion to amend his complaint, the undersigned finds no reason for reconsideration. Therefore, Complainant's motion to vacate the August 7, 2003 order is denied.

5. Complainant's Motion to Alter Deadlines

Complainant's motion to alter deadlines does not specify which deadlines it seeks to alter, although it is inferred that Complainant desired to extend the deadline for filing discovery motions. The deadlines for conducting discovery and filing discovery related motions has been extended numerous times. The undersigned finds no compelling reason to extend the deadlines again. Therefore, Complainant's motion to alter deadlines is denied. Acknowledging that the deadline for discovery has passed, Respondent may still take the live deposition of Complainant and Respondent may supplement his pre-hearing statement before the hearing with any information initially obtained through the deposition. The pre-hearing statements of both parties may be supplemented with information initially obtained through Complainant's informal interviews or depositions on an individual basis, but only after individual submission containing a statement of position as to why such information shall be submitted into the evidentiary record.

6. Respondent's Motion to Dismiss

On August 27, 2003, Respondent filed a motion to dismiss together with a brief in support of motion to dismiss and a supporting affidavit from counsel for Respondent. Respondent set forth the course that discovery has taken in this matter, concluding with Respondent's claim that he is unsure that Complainant notified him that he would not attend his deposition on August 19, 2003, which was the third time that Complainant's deposition had been scheduled. Respondent then alleged that Complainant would not re-schedule the deposition, unless it was a deposition conducted over the telephone. Furthermore, Respondent alleged that it has been prejudiced by presently having been unable to depose Complainant with the hearing scheduled to begin on

September 9, 2003. In requesting that the undersigned dismiss Complaint's claim, Respondent recognizes that dismissal is a harsh sanction, but argues that it is needed to penalize Complainant for his conduct and to deter others from engaging in similar conduct.

In a response filed on August 28, 2003<sup>1</sup>, Complainant stated that he would appear along with his counsel "in Michigan next week for depositions of Mr. Howick and other witnesses." Complainant again relied upon personal reasons to justify his unavailability. In the conference call held on August 28, 2003, Complainant represented that he will make himself available in Michigan on September 3, 2003. Additionally, Complainant also stated his intent to conduct individual interviews with non-management level employees of Respondent. Counsel for Respondent agreed to schedule the deposition of Complainant on September 3, 2003, provided that the deposition was conducted in the offices of counsel for Respondent in Detroit, Michigan. Counsel for Complainant vehemently objected to the offices of counsel for Respondent as the situs for the deposition of Complainant.<sup>2</sup> The undersigned, over Complainant's objection, ruled that the offices of counsel for Respondent in Detroit, Michigan will be the situs for the deposition of Complainant on September 3, 2003. Since Respondent's motion to dismiss was predicated on the three separate failures of Complainant to attend his scheduled deposition, and in light of

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<sup>1</sup>Counsel for Complainant raises an objection under 29 C.F.R. § 18.3(f)(6) to Respondent's filing of a motion to dismiss by facsimile that exceeded the allowed 12 pages. The undersigned excuses Respondent's violation of § 18.3(f)(6), the filing of a 20 page motion to dismiss when all documents were included. It is ironic that the document submitted by counsel for Complainant raising the violation of § 18.3(f)(6), was itself in violation of § 18.3(f)(4) and (7) because it was transmitted without a cover sheet and it was received at the Office of the Administrative Law Judges after 5:00 pm. The undersigned also excuses Complainant's violations.

<sup>2</sup>Counsel for Complainant objected to the deposition being held in the offices of counsel for Respondent on several grounds, which included his representation that Complainant objected to being held prisoner in the twenty-fifth floor of a corporate law firm's offices, that Complainant and his counsel would be required to obtain accommodations that were more expensive in Detroit than in Warren, Michigan, and that Complainant and his counsel would also have to pay to park in downtown Detroit. Additionally, during the conference call, counsel for Complainant argued that the Department of Labor does not adequately protect Whistleblowers because of their culture of desuetude. Counsel for Complainant urged the undersigned to provide a reasonable accommodation to himself and Complainant. Counsel for Complainant has frequently cited to *Seater v. Southern California Edison Co.*, 95-ERA-13 (ARB September 27, 1996) and referenced the ADA when requesting a reasonable accommodation. Notwithstanding the representations made by counsel for Complainant during the August 28, 2003 conference call, the Administrative Review Board on remand in *Seater* simply directed that "the manner in which [a witness who was critically ill] is taken on remand must accommodate [the witness'] physical condition at that time. Prior to scheduling of a deposition or a supplemental hearing, Seater must provide medical evidence concerning [the witness'] *current* physical condition and any medically imposed restrictions pertinent to the taking of [the witness'] testimony. Based on the information provided, the ALJ then must issue an appropriate order concerning the conditions under which discovery, if appropriate, will be conducted and [the witness] testimony will be taken." Obviously, the ARB did not order the administrative law judge to make any specific accommodations, rather, based on medical evidence regarding the witness' current physical condition, the administrative law judge was to devise and appropriate accommodation to allow the witness to provide testimony. It is of notable distinction that the ARB's ruling in *Seater* concerned a witness with a critical illness. Here, counsel for Complainant is requesting accommodations for himself and Complainant based on financial concerns. Neither counsel for Complainant nor Complainant himself purport to be suffering from a critical illness. Moreover, Complainant is the one responsible for prosecuting his claim; he is not simply a witness. It is also notable that the ARB in *Seater* declared that reliance on the ADA was misplaced, noting that access for handicapped individuals to Federal agency proceedings is provided for by Section 501 of the Rehabilitation Act of 1973, as amended, 29, U.S.C. § 791.

Complainant's representations that he will appear in Detroit, Michigan on September 3, 2003 for his deposition, a ruling on Respondent's motion will be reserved. A final decision on Respondent's motion to dismiss will be provided at the outset of the hearing, in part based on whether or not Complainant attends his deposition as scheduled.

The Sixth Circuit Court of Appeals considers four factors in assessing the appropriateness of a decision to dismiss a complaint for failure to prosecute: (1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal of the action. *Mulbah v. Detroit Bd. of Educ.* 261 F.3d 586, 589 (6<sup>th</sup> Cir. 2001) (finding that district court abused its discretion by dismissing suit, and stating that an alternative sanction should have been employed that would have protected the integrity of the pre-trial procedures even though the plaintiff and her counsel could have proceeded in a more timely and professional fashion), *citing*, *Knoll v. American Tel. & Tel.*, 176 F.3d 359 (6<sup>th</sup> Cir. 1999). An administrative law judge has dismissed a complaint filed under the STAA where the Complainant did not comply with discovery and pre-trial orders. *See White v. "Q" Trucking Co.*, 93-STAA-28 (ALJ Aug. 12, 1994).

Based on Complainant's actions in presently failing to have appeared for his deposition on three occasions, the undersigned is considering alternative sanctions to dismissal of his claim as authorized by 29 C.F.R. § 18.6(d), including but not limited to, inferring that the testimony of Complainant would have been adverse to Complainant, ruling that the testimony of Complainant is established to be adverse to Complainant, ruling that Complainant may not rely on his testimony in support of his claim, ruling that Complainant may not object to the introduction and use of secondary evidence to show what Complainant's testimony would have shown should he not appear for his deposition, or render a decision of the proceeding be rendered against Complainant. Accordingly, Complainant should take note that the undersigned is considering assessing sanctions against Complainant due to his failure to cooperate in the prosecution of his claim and to follow orders of the undersigned Administrative Law Judge.

Complainant informed the undersigned during the August 28, 2003 conference call that he intended to conduct informal interviews of non-management employees of Campbell-Ewald while attending his deposition in Michigan. Counsel for Respondent raised an objection to Complainant conducting the interviews or any depositions because they would be conducted outside of the period allowed by the undersigned for discovery. Counsel for Respondent also raised an objection to the list of Campbell-Ewald employees Complainant designated for interviews, arguing that the list encompassed all of Campbell-Ewald's employees. While such interviews would be conducted outside of the period allowed for discovery, in light of Complainant's motion to alter deadlines for discovery, the undersigned will allow Complainant to conduct informal interviews. However, the sum of interviews and depositions conducted by Complainant will be limited to a total of ten persons.

Since the deadline for filing discovery motions has passed, and in light of Complainant's motion to alter deadlines, counsel for the parties are directed to make any objections to questions posed during depositions on the record, then instruct their respective clients to answer the

questions unless they relate to matters of privilege. The undersigned will rule on any discovery related objections as they arise in the normal course of the hearing set to begin on September 9, 2003. Since the depositions are conducted at a time precariously close in proximity to the hearing, the parties are encouraged to cooperate so that complete evidentiary development may occur. Therefore,

### **ORDER**

IT IS ORDERED that:

1. Complainant's motion for partial summary judgment is DENIED;
2. Complainant's motion for leave to file further exhibits/argument is DENIED;
3. Complainant's motion to vacate the order dated August 7, 2003 is DENIED;
4. Complainant's motion to alter deadlines is DENIED to the extent that it is not inconsistent with the undersigned's ruling on the depositions and interviews;
5. A ruling on Complainant's motion for a protective order is RESERVED;
6. A ruling on Respondent's motion to dismiss is RESERVED; a final ruling on the motion to dismiss shall take into consideration whether Complainant attends the deposition scheduled for September 3, 2003 in the offices of Clark Hill, PLC, Detroit, Michigan, as well as whether Complainant engages in a good-faith effort to timely complete a meaningful deposition;
7. Complainant's deposition is scheduled for September 3, 2003 in the offices of Clark Hill, PLC, Detroit, Michigan;
8. Complainant may conduct the inclusive sum of ten depositions and informal interviews;
9. Pre-hearing statements, prepared in strict accordance with 29 C.F.R. § 18.7(b) are due in the offices of the undersigned Administrative Law Judge on Tuesday, September 2, 2003 by 4:00 pm; Respondent may supplement its statement based on any information initially obtained through its deposition of Claimant; the parties may also supplement their statements at the discretion of the undersigned based on information initially discovered through Complainant's informal interviews or depositions if the supplementary statement contains a position statement explaining the relevance of the evidence and good-cause as to why it should be admitted after the close of discovery.
10. A pre-hearing conference call is scheduled for 9:00 am on September 5, 2003; and

11. The formal hearing on this matter shall begin at 9:00 am on September 9, 2003 in Dayton, Ohio, whereupon counsel for each party shall be permitted to make a fifteen minute opening argument solely limited to setting forth the evidence it intends to rely upon in support of its position and submitting such exhibits into evidence.

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THOMAS F. PHALEN, JR.  
Administrative Law Judge